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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 146

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

EDNA K. YATES.

REPLY BRIEF AND ARGUMENT FOR JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

ROBERT W. SMITH, JR.,
Attorney for Petitioner.

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On page two of the petition for certiorari it is stated that the proofs of death disclosed that the insured died of carcinoma of the intestine, and that he showed symptoms of that disease since March, 1932. This statement of fact is questioned by respondent's brief, page 1, and is admitted to be true by other references thereto on pages 4 and 7. It finds support in the record, page 52 B. The remainder of respondent's brief is taken up with argument to the effect that no false representations were

made, and if made the jury were authorized to find that they were not material.

We will not pause to analyze the evidence supporting petitioner's contention that under the New York law the policy is void on account of material false representations. The facts as to that contention were found in petitioner's favor by the Court of Appeals of Georgia (R. 57-58), affirmed by the Supreme Court of Georgia (R. 74-82). We recognize the long established rule of this Court that findings of fact by the State court in ordinary cases are binding upon this Court. We do not ask this Court to review the facts; we base our contentions here upon the facts as found by the Georgia courts.

The Supreme Court of Georgia in its opinion in referring to petitioner's assignments of error found that each and every one of them is based upon the contention of the insurer that the statutes and decisions of the State of New York, rather than those of Georgia, should determine the effect of alleged false statements made in the application for insurance in the trial of the case in the courts of Georgia. It is submitted that these assignments of error clearly present a substantial question under the full faith and credit clause of the Constitution.

Aetna Life Insurance Company vs. Dunken, 266 U. S. 389, 393, 399.

Royal Arcanum vs. Green, 237 U. S. 531, 540, 541.

The Dunken case involved a suit in Texas upon a policy of life insurance executed in Tennessee. Judgment was entered against the Company which included penalty and attorneys fees, allowable under

the Texas statutes. Under the law of Tennessee no penalty or attorneys fee was recoverable. The insurer contended that the policy was a Tennessee or Connecticut contract, and since under the laws of those states no penalty or attorneys fee was recoverable, the Texas statute as construed and applied violated, among other provisions, the full faith and credit clause of the Federal Constitution. In denying a motion to dismiss the writ of error for want of a Federal question of substance this Court held:

> "Other matters aside, the contention that the contract is controlled by the law of Tennessee or Connecticut — in which event the Texas statute in respect of penalty and attorneys fee as construed and applied, is unconstitutional— clearly presents a substantial question under the full faith and credit clause of the Constitution."

This Court in the Dunken case further held:

> "The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. The Texas statute was incapable of being constitutionally applied to it since the effect of such application would be to regulate business outside the state of Texas and control contracts made by citizens of other states in disregard of their laws under which penalties and attorneys fees are not recoverable."

The Supreme Court of Georgia (R. 78) puts petitioner in the position of contending that under the law it was for the court and not the jury to determine whether the alleged misrepresentations are in fact material. We respectfully submit that this record can be searched in vain for any such contention. We did contend before the Georgia courts that the un-

contradicted evidence showed that false representations had been made, which from their very nature were material to the risk, that the court should so declare them as a matter of law, and that no questions of fact upon that issue were involved requiring submission to the jury. We do not urge these contentions upon this Court as they do not involve any Federal question. We do not ask this Court to review the holding by the Supreme Court of Georgia that in the courts of Georgia the materiality of representations made by the insured in his application is a question for the jury to decide. Whether under the law of the forum, the question of the materiality of the misrepresentations is to be properly decided by court or jury, we submit that the determination of such question should be made with full faith and credit given to the laws of New York where the contract was executed, under which laws parol testimony was inadmissible to set up either estoppel or waiver as to the defense based on material misrepresentation.

As we have previously shown under Section 58 of the New York Insurance Law, as construed by the Court of Appeals of New York, proof of waiver or estoppel by evidence that the insured gave truthful answers contrary to the statements in the application cannot be shown. Due objections were timely made to the offer of this illegal evidence and to the charge of the court authorizing the jury to consider it as constituting a waiver of the insurer's defenses. (R. 28 to 40). The Court of Appeals of Georgia held that the jury would be authorized to find that the agent had actual knowledge of the facts prior to the issuance of the policy, and that the insurer would now be estopped from asserting that the policy was

void because of such misrepresentations. (R. 58 to 61). Petitioner's contention that the decision of the Court of Appeals as above stated violated its rights under the full faith and credit clause of the Constitution, was set up in the petition for certiorari in the Supreme Court of Georgia. (R. 64 to 73).

The Supreme Court of Georgia, in holding that petitioner's rights under the full faith and credit clause of the Constitution had not been violated, undertakes to rest its holding upon the ground, as stated in the opinion (R. 79), that by Section 58 of the New York Insurance Law and its construction by the court of last resort of New York, the courts are to determine the materiality of all representations made by the applicant for life insurance. Whether this interpretation of the New York statute and decisions of the New York Court of Appeals construing it, be right or wrong, we think is of no significance here. Nowhere in its opinion does the Georgia Supreme Court hold that the misrepresentations made in this case were immaterial as a matter of law. Its decision, therefore, cannot rest upon that non-Federal ground. The decision simply holds that the jury is to decide the question of materiality. We are then brought to the inquiry—

> May the Courts of Georgia in the trial of the issue of materiality, which is a question for the jury to decide, constitutionally admit parol evidence of waiver and estoppel, and instruct the jury that they are authorized to find that the defense of material false representation has been waived, when waiver and estoppel are prohibited by the law of the place where the contract was made?

The Supreme Court of Georgia recognizes the New York statute referred to and the decisions of the

Court of Appeals of New York construing it and holding that the applicant is bound by the answers as written, though the insured gave truthful oral answers. (R. 78).

The Supreme Court of Georgia in its opinion does not especially refer to or discuss the special assignments of error made by petitioner in the court below, objecting to the waiver of its affirmative defenses of false representation. The Supreme Court contents itself with disposing of these assignments of error by approvingly citing and discussing its former decisions in

Johnson vs. Aetna Insurance Company, 123 Georgia 404,

and

Mechanics Insurance Company vs. Mutual Building Association, 98 Georgia 262.

These decisions hold

> " 'Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered,' and limitations therein upon the authority of the agent to waive such conditions, otherwise than in writing attached to or indorsed upon the policy, are treated as referring to waivers made subsequently to the issuance of the policy."

That this is not the law of New York is self evident from an examination of Section 58 of the New York Insurance Law as interpreted and construed by the Court of Appeals of New York in

Minsker vs. John Hancock Mutual Life Insurance Company, supra.

The Supreme Court of Georgia, as we have shown,

found the New York law to be properly laid down in the Minsker case, but nevertheless insists that the Georgia law is applicable to this case. We respectfully submit that the Georgia law of waiver and estoppel cannot constitutionally be applied so as to defeat the rights of the insurer to defend upon the ground of material false representations. As was said by this Court in

Dower vs. Richards, 151 U. S. 658, 667,

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this Court."

It is mentioned in respondent's brief (page 6), that the entire charge of the trial court is not in the record, and it is argued (page 9), that the presumption is that the charge adequately submitted the issues to the jury. The portions of the charge excepted to are set out in totidem verbis in the amended motion for new trial. These exceptions were not decided adversely to petitioner upon the ground that the charge otherwise adequately submitted the issues to the jury, but their validity was made to depend upon whether the lex fori or lex loci contractus controlled. (R. 63). The charge as a whole was omitted by petitioner in its praecipe (R. 99) in an effort to comply with the rules of this Court as expressed in

Texas & Pacific Railway Company vs. Leatherwood, 250 U. S. 478, 482.

Respondent while specifying other portions of the record in her praecipe did not include the entire

charge as being necessary. We submit that this objection to the record as well as the presumption which respondent seeks to impose are without merit.

Respectfully submitted,

ALEX W. SMITH, JR.,
Attorney for Petitioner.